STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

CHARLES HIXSON, Appellant, and STATE OF IOWA (DEPARTMENT OF CORRECTIONS), Appellee.	CASE NOS. 102326 102330

DECISION ON REVIEW

This case is before the Public Employment Relations Board (PERB or Board) on the State's petition for review of a proposed decision and order issued by an administrative law judge (ALJ) following an evidentiary hearing on Charles Hixson's consolidated Iowa Code section 8A.415 appeals. Hixson appealed the imposition of a five-day suspension and final warning (Case No. 102326) under subsection 8A.415(2)(*b*) contending the disciplinary action was not supported by just cause. Hixson subsequently grieved an employee performance evaluation (Case No. 102330) under subsection 8A.415(1)(*b*) alleging the State failed to substantially comply with DAS rule 11—62.2 that requires evaluations to be given at a minimum of every 12 months and to rate an employee as meeting job expectations for periods of time while on FMLA leave.

In her proposed decision, the ALJ concluded the State established just cause for the imposition of a written reprimand but not the imposition of a five-day suspension with final warning. The ALJ further concluded the State failed to substantially comply with DAS rule 11—62.2 because it evaluated Hixson as not meeting expectations for a period of time he was on FMLA.

The State filed a voluntary brief prior to oral arguments, which were held on December 7, 2021. Attorney Anthea Hoth presented arguments on the State's behalf. Appellant Charles Hixson presented arguments on his own behalf.

Pursuant to Iowa Code subsection 17A.15(3), on appeal from an ALJ's proposed decision, we possess all powers that we would have possessed had we elected, pursuant to PERB rule 621—2.1(20), to preside at the evidentiary hearing in the place of the ALJ. Pursuant to PERB rules 621—11.8 (8A, 20) and 621—9.5 (17A, 20), on this petition for review we have utilized the record as submitted to the ALJ.

Based upon our review of this record, as well as the parties' written and oral arguments to the Board, we adopt the ALJ's findings of fact with the modifications addressed below. We also adopt, in part, the ALJ's conclusions with additional discussion as grounds for our decision. While we agree with many of the ALJ's underlying determinations, the Board concludes just cause supported the State's imposition of a five-day suspension and final warning. We further conclude the State substantially complied with DAS rule 11—62.2.

FINDINGS OF FACT

The record supports the ALJ's findings of fact, as set forth in her proposed decision and order attached as "Appendix A." We adopt the ALJ's factual findings as our own with the following modifications.

The ALJ found the record does not contain evidence of Troy White's supervisory notes. App. at 3. Upon review, the Board clarifies this finding to state the record does not contain evidence of White's supervisory notes concerning

Hixson that predate the March 4, 2019, notice of suspension. White's supervisory notes regarding Hixson documented conversations that occurred after Hixson was given the five-day suspension and final warning at issue here.

The ALJ found Hixson's evaluations were not part of the record. App. at 18-19, 37. Upon review, we find the record contains Hixson's annual performance evaluations for periods covering December 2015 to December 2016, December 2016 to December 2017, and December 2017 to April 2019. The performance evaluations in record (State Exhibits 1-3), although filed in Case No. 102330, are part of the consolidated record that pertain to both appeals. In the 2015-16 evaluation, Hixson was told to "continue to be careful about the contents of your electronic messages and other correspondence with other staff. Improvements in your efforts are noted so please continue." In the 2016-17 evaluation, Hixson was similarly told to "be careful about the contents of your electronic messages and other correspondence." The evaluator noted some of Hixson's communications come off as "more aggressive" than he intends, but that Hixson had improved in that area during the evaluation period and encouraged Hixson to continue in his efforts. The December 2017 to March 2019 evaluation was issued after the imposition of the five-day suspension. Any references to improper email usage in that evaluation were addressing the issues that precipitated the five-day suspension at issue in this appeal.

The ALJ found the investigative report (State Exhibit 22) did not contain any mitigating factors. App. 16. The ALJ's finding is supported to the extent the report did not specifically outline mitigating factors under the "analysis and mitigators"

section of the report. However, the investigative report did contain the entirety of Hixson's email that he sent to the investigators, dated 1/25/2019 and 1/28/2019, following his interview. In these emails, Hixson provided additional information, including his medical diagnoses and related issues, to be considered as part of the discipline decision. The decisionmaker, Michael Savala, was provided the information at the time he reviewed the investigative file and determined the discipline.

The State contends the ALJ made other unsupported findings in her decision. Upon our review, other than the specific findings discussed and modified above, we find the ALJ's findings are supported by the record.

CONCLUSIONS OF LAW

I. *Five-Day Suspension and Final Warning*

We have reviewed the parties' arguments in our review of the ALJ's conclusions. The ALJ correctly examined the totality of circumstances to reach her conclusions. We agree with many of the ALJ's underlying determinations as set out in Appendix A and adopt them as our own, with the following additional discussion and modification.

The ALJ properly considered the just cause factors in her analysis. The Board agrees with the majority of the ALJ's analysis, and fully adopts the ALJ's discussion pertaining to notice and forewarning of work rules, investigation, and evidence of violation. The Board further adopts the ALJ's cited precedent on progressive discipline. However, we disagree with the ALJ's conclusion regarding the applicability of progressive discipline in this case and modify the ALJ's

conclusion regarding the appropriateness of the discipline imposed. Upon consideration of all the facts established and for the reasons discussed, we find just cause supports DOC's decision to skip progression and discipline Hixson with a five-day suspension and final warning.

As correctly recognized by the ALJ, although progressive discipline is generally the policy, PERB has found that serious and egregious conduct may warrant skipping disciplinary steps ordinarily imposed or render progressive discipline entirely inapplicable resulting in the employee's summary discharge. App. at 35. When determining the appropriate type of discipline given the circumstances, PERB examines the severity and extent of violations, position of responsibility held by the employee, employee's prior work record, and whether the employer has developed a lack of trust and confidence in the employee to allow the employee to continue in that position taking into account the conduct at the basis of the disciplinary action. *Phillips and State of Iowa (Dep't of Corr.)*, 98 H.O. 09 at 15; *Estate of Salier and State of Iowa (Dep't of Corr.)*, 95-HO-05 at 17. The ALJ placed considerable weight on the mitigating circumstances to conclude a written reprimand was the appropriate discipline. App. at 40-41. We reach a different conclusion. Considering all the facts and mitigating circumstances, we find Hixson's violations were serious and egregious enough to skip progression.

The emails underlying Hixson's discipline were sent to and about DOC employees using the State email system. The eight emails cited in the discipline letter contained vulgar, profane, and inappropriate language and characterizations

about other DOC employees. Particularly egregious to us are two emails. Hixson sent one email to a co-worker that contained a racially offensive and disrespectful description about their supervisor. Although Hixson claims the message was merely intended to be humorous, not racially offensive, it does not change the content of the email that Hixson chose to write. Hixson also sent an email to a different co-worker that described an interaction with a DOC employee, not just by using profane, inappropriate, and disrespectful language, but also referring to the employee by a derogatory term based on a person's sexual orientation. Discriminatory statements have no place in the workplace and certainly should not be distributed over the State email system which is subject to public disclosure. These actions constitute a serious and egregious violation of multiple DOC policies.

We also find Hixson's supervisory status and rank within the institution to be an important consideration when determining the appropriate discipline. As a supervisor, Hixson oversees correctional officers and is tasked with enforcing DOC policies. Hixson is reasonably expected to know and do better because it is part of his job to hold correctional officers accountable for violations of DOC policies. The record shows he has disciplined officers specifically for the type of policy violations he has engaged in himself. Hixson knew the policy expectations, as he held officers accountable under it, yet engaged in conduct himself that violated those same policies. This fact reasonably eroded the trust and confidence the DOC had in Hixson to fulfill his supervisory duties in terms of enforcing DOC policies.

As discussed by the ALJ, this case presents several important mitigating circumstances, all of which we have considered as part of our decision.

One mitigating circumstance is Hixson's PTSD diagnosis that he presented to DOC following his investigatory interview. The DOC appears to have interpreted this diagnosis as Hixson not accepting responsibility because it was not previously documented during his employment. In our review of the record, we do not view this as Hixson's failure to accept responsibility. Hixson acknowledged during his investigatory interview that his emails were inappropriate, and subsequently sent emails to the investigators expressing regret and embarrassment about his conduct. We view his actions as accepting responsibility and subsequently seeking treatment to deal with issues caused by PTSD. The PTSD diagnosis, which was made by a medical professional, is properly considered as a mitigating circumstance that may explain some of the emails Hixson sent or his behavior during his interaction with the Warden's assistant. Nonetheless, the PTSD diagnosis does not play a role in all of the incidents underlying the discipline and it does not mitigate the serious nature of the racial and discriminatory content in his emails.

The record also establishes upper management had an open-door policy that allowed correctional supervisors to freely discuss workplace frustrations and grievances with their superiors. Some of those discussions involved the questioning of DOC leadership's decisions as well as the use of profanity. The record further shows these conversations were only held as private conversations between the employee and the supervisor and it was understood by both parties that they were to remain private. More importantly, nothing in the record shows that racially offensive or discriminatory references about DOC employees were

tolerated even when correctional supervisors were privately discussing workplace frustrations one on one with the supervisor.

Finally, Hixson's lengthy tenure with the DOC presents an important consideration. He has been employed with the DOC for over 34 years. Hixson's tenure and work performance has been predominantly positive. He has held many important roles during his tenure and served to promote the DOC mission. While recognizing his tenure, we still do not find it sufficient to warrant a lesser discipline than the one imposed by DOC. We find that Hixson has been warned to watch the content of his electronic messages. His last two evaluations prior to the discipline at issue here warned him to change his behavior before it rose to the extent established by this record.

Upon consideration, the presence of mitigating circumstances does not outweigh the seriousness of the established violations. This is particularly true when we consider Hixson's supervisory role and rank within the institution. As the record reveals, the DOC considered termination and demotion as possible punishments. Ultimately, it determined five-day and final paper suspension is appropriate. We agree with that determination. Despite the seriousness and egregiousness of the violations, Hixson was not terminated and thus has an opportunity to correct his behavior.

We recognize that a five-day and final paper suspension is a severe form of discipline. On DOC's disciplinary steps, it is the penultimate step to termination. But the facts as established by the record justify a severe form of discipline. Having considered the entirety of the record and all of the arguments

raised by the parties, we conclude the State established just cause within the meaning of section 8A.415(2)(*b*) for issuing Hixson a five-day paper suspension and final warning.

II. *Performance Evaluation*

We have considered the parties' arguments in our review of the ALJ's conclusion pertaining to Hixson's performance evaluation grievance. The ALJ correctly examined the applicable substantial compliance standard governing grievance appeals. We agree with most of the ALJ's reasoning set out in Appendix A and adopt them as our own, with the following additional discussion and modification. Upon consideration of the facts and applicable legal standard, we find the DOC substantially complied with DAS rule 11—62.2(2) in entirety.

Hixson claims in part that the DOC's decision to extend his 12-month evaluation period does not conform to the requirements under 11—62.2. The applicable DAS rule states the employer shall prepare a performance evaluation "at least every 12 months." As addressed by the ALJ, it is undisputed the DOC did not literally comply with the rule, but also that literal compliance is not required. Instead, the proper inquiry is whether Hixson's evaluation met the objective of the rule. PERB has previously found the objective of performance evaluations is to provide an employee with regular feedback and an opportunity for the employee to respond. App. at 45. The specific facts presented by this record is that Hixson was on medical leave in December 2018 when the 12-month evaluation was due, and had been on medical leave since July. When he returned to work in late January 2019, Hixson was placed on administrative leave and remained on administrative

leave until March. We do not find the DAS rule required the employer, under these particular circumstances, to call an employee to work from medical or administrative leave for the sole purpose of evaluating his performance. Upon his return, Hixson was given an evaluation that provided him with feedback and an opportunity to respond. As such, we find the DOC substantially complied with the rule when it extended the evaluation period because the employee was on leave.

Hixson also claims the DOC failed to substantially comply with the provision of 62.2(2) that requires periods of service during FMLA to be considered as meeting job expectations. Hixson was on FMLA from July 2018 to January 2019, and that period of time is included in the performance evaluation that he grieves. He was rated as not meeting expectations as a result of the violations that precipitated the five-day suspension, some of which occurred during the period of time he was on FMLA. In reviewing the cited rule language, we do not find the objective of this rule is to provide blanket protection against unsatisfactory performance evaluations solely because an employee is on FMLA. We view the language at issue as prohibiting the employer from punishing an employee, through unsatisfactory ratings, because the employee is utilizing FMLA or is unable to fulfill certain aspects of his job because of his FMLA leave. The reason underlying the rating is important. In this case, Hixson's usage of FMLA had no bearing on the unsatisfactory performance rating he received. Instead, the rating was given because Hixson was found to have engaged in conduct that violated DOC policies. The fact that he happened to be on FMLA while he engaged in such violations is irrelevant. Thus, we find the DOC substantially complied with the portion of the

rule pertaining to rating during periods of FMLA leave.

For the reasons discussed, we conclude the DOC substantially complied with DAS rule 11—62.2(2) in its entirety.

Accordingly, we enter the following:

ORDER

Charles Hixson's state employee disciplinary action appeal, PERB Case No. 102326, and his state employee grievance appeal, PERB Case No. 102330, is hereby DISMISSED.

The cost of reporting and of the agency-requested transcript in the amount of $4,566.25 is assessed against Charles Hixson pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9. Bill of costs will be issued to Charles Hixson in accordance with PERB subrule 621—11.9(3).

This decision constitutes final agency action.

DATED at Des Moines, Iowa this 22nd day of June, 2022.

PUBLIC EMPLOYMENT RELATIONS BOARD

Erik M. Helland, Chair

Jane M. Dufoe, Board Member

Electronically filed.
Parties served via eFlex.

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

CHARLES HIXSON, Appellant, and STATE OF IOWA (DEPARTMENT OF CORRECTIONS), Appellee.	CASE NOS. 102326, 102330

PROPOSED DECISION AND ORDER

The Appellant, Charles Hixson, filed two state merit employee appeals with the Public Employment Relations Board (PERB) pursuant to Iowa Code sections 8A.415(1) and (2) and PERB rule 621-11.2.

In case number 102326, filed pursuant to 8A.415(2), Hixson alleges that the five-day final warning paper suspension he received was not supported by just cause. In case number 102330, filed pursuant to 8A.415(1), Hixson alleges that the State did not substantially comply with the Department of Administrative Services (DAS) rule 11—62.2 with regards to his performance evaluation.

Hixson's appeals were consolidated. Pursuant to notice, an evidentiary hearing on the merits of these two appeals was held on November 26, and December 4 through 6, 2019. Hixson was self-represented and attorney Anthea Galbraith represented the State. Both parties filed post-hearing briefs on or before February 28, 2020.

FINDINGS OF FACT

The Mount Pleasant Correctional Facility (MPCF) is a Department of Corrections (DOC) minimum-security facility located in Mount Pleasant, Iowa. At all relevant times, Jay Nelson was MPCF warden, Marcella Stroud was Deputy Warden and she supervised Troy White, Associate Warden of Security (Security Director). White supervised ten correctional supervisors, including Charles Hixson. Prior to White, William Stump was the Security Director.

Case No. 102326: 5-day Final Warning Paper Suspension

Charles Hixson began his employment with the State on June 10, 1988, as a Correctional Officer at MPCF. He was promoted to Correctional Supervisor I with a lieutenant ranking in 2002, and in 2005 he was promoted to Correctional Supervisor II with a captain ranking.

As a correctional supervisor, Hixson's primary job duties were to supervise and evaluate correctional officers at MPCF and ensure that staff under his supervision performed their duties according to IDOC policies and MPCF rules. As a supervisor, Hixson has coached and counseled his subordinates regarding the use of state computers. Most recently, in 2016, Hixson coached and counseled four employees that "state equipment was to be used only for state work related communications" after these employees responded to non-work-related emails and received inappropriate emails including pictures. Besides his supervisory job tasks, Hixson also served as an investigator conducting both staff and offender investigations.

The State issued Hixson two written reprimands since 2015. The State issued the latter of the two reprimands on January 4, 2016, for violation of IDOC General Rules of Employee Conduct AD-PR-11, sections E-1 and H-1 and 2 when he "referred to his supervisor in a derogatory manner in front of correctional officers." There is no evidence in the record that this reprimand was appealed.

The State issued the earlier of the two reprimands on December 7, 2015, for violation of MPCF General Rules of Employee Conduct AD-PR-11, rule 21 that pertained to professional demeanor. Hixson appealed the disciplinary action, and subsequently filed a state employee grievance appeal with PERB, Case No. 100723. A PERB Administrative Law Judge (ALJ) concluded there was an absence of just cause to support the issuance of the written reprimand. As a result, this reprimand could not be used in any future disciplinary actions. The ALJ further found that Hixson's supervisor, Security Director Stump, maintained supervisory notes that were not shared with employees or placed in their personnel files.

White became security director on January 26, 2018. The record does not contain any evidence of White's supervisory notes concerning Hixson.

Both Stump and White had an open-door policy that allowed the correctional supervisors to vent. According to White, these conversations were not to leave the office, not be done in front of subordinates and "not go sideways."

On July 17, Hixson began a medical leave of absence. The only relevant policy with regards to off-duty conduct is DOC policy AD-PR-27, section C-3d, which prohibits employees from accessing e-mail during non-working hours without prior approval. However, MPCF correctional supervisors did not follow this policy and frequently accessed their emails during non-working hours. While Hixson was on medical leave, he sent and received emails on his state email account which ranged from acceptable to inappropriate, to profane, to crude and vulgar.

In the afternoon of July 31, White emailed Hixson asking him why an incarcerated individual had been pulled from a certain work crew. Hixson responded with a crude email referencing the kidnapping of a newspaper carrier. White did not respond back to this email.

In August, Hixson underwent surgery, and Hixson was prescribed hydrocodone.

On Friday, August 10, while on medical leave, Hixson sent an email to White about a correctional officer candidate. In the first three substantive paragraphs, Hixson recommended that the candidate not be hired. In the fourth paragraph, Hixson wrote:

> As I stated, I hate writing this but feel it is the right thing to do. Not out of a sense of loyalty to the institution or department but to those who work under and beside me. Lord knows after the past and current dirty politics the administrations of MPCF, Department of Corrections, and the State of Iowa have used and continue to use against me to arbitrary stymie my career, making the so loyalty, along with respect, trust, confidence, and overall like are things furthest from my mind and soul. The incompetence of the leadership/administration conflicts me, as I don't know whether to laugh or puke. Nepotism and the good ole' boy system is still very

> much alive and well. No matter how much on the surface, administration attempts to dress it up and disguise it. Underneath, it is still just a big ugly retarded chimp being run by a gaggle of monkeys. Only saving grace is, I keep telling myself, as I've told my kids many times.... What is done in darkness, will one day come to light. It's only a matter of someone flipping the switch on....

According to Hixson, it was not directed at any one person. He was venting; expressing his frustration about not being selected for an investigator position. However, this was not the first time that Hixson had expressed his frustrations regarding this promotion. White believed that Hixson's statements expressing concern about a correctional officer candidate was appropriate, but that the above-quoted paragraph was "extremely inappropriate, inflammatory, unprofessional and it had to be looked at." White did not communicate his concerns to Hixson about the inappropriateness of this email. Instead, he forwarded the email to MPCF's executive committee[1] with the comment, "And then there is this...."

Because the executive committee felt the email was egregious, Hixson's email was forwarded by Nelson to DOC Deputy Director Dan Craig, on August 13, with the comment: "While we appreciate the feedback regarding the CO candidate the rest of this is a violation of AD-PR-11[2] and especially inappropriate from a Supervisor."

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[1] The MPCF executive committee is comprised of Warden Nelson; Deputy Warden Stroud; Security Director Troy White; Treatment Services Director Nick Peitz; nursing director, two administrative services directors, and business manager. Debra Moeller, Administrative Assistant to the Warden, also attends the meetings.

[2] AD-PR-11 is IDOC's General Rules of Employee Conduct.

Shortly after receiving the email, Craig forwarded the email string to DOC's Human Resources Director Susie Pritchard with the note, "Thoughts?" Pritchard responded to Craig and copied DOC's Personnel Officer, Erick Lynes, saying it needed to be investigated by someone outside of MPCF.

Based upon this email, Craig requested, on August 14, that investigators with the Office of the Inspector General[3] be assigned to conduct an investigation. As a result, Dave Siler and Shane Franklin, both Investigators IIIs, were assigned to investigate Hixson's August 10 email. Both Siler and Franklin were trained. neutral, and had the authority to retrieve an employee's emails.

Upon reviewing the August 10 email, Siler requested from White approximately a year's worth of emails from Hixson's state email account in order to determine if Hixson "had made statements similar to this in the past."

On August 14, White forwarded to Siler and Franklin an additional email that Hixson had sent on July 1. Hixson had received an email from another employee expressing concerns regarding a MPCF employee that he forwarded to Nelson, Stroud and White. In this email, he also expressed his displeasure that this employee had been selected for a promotion. In expressing his displeasure, he called the employee in question, "a slimy, unethical snake and the only way to deal with a problematic snake is to lop it's head off." Neither Nelson nor Stroud informed Hixson that this email was inappropriate. White, in his investigatory interview, stated that he did speak to Hixson concerning this

[3] At that time, the Office was called the Department of Inspective Services.

email's inappropriate and unprofessional nature. However, Hixson denies that this conversation took place and there is no supporting documentation regarding their conversation.

In addition, Siler obtained Stump's supervisory notes concerning Hixson in order to determine if this type of behavior had been previously addressed. These notes were from November 9, 2006 through June 24, 2017, and contained references to coach and counseling sessions, ventings, references to other emails as well as other matters. There is no evidence that Siler requested Hixson's performance evaluations.

On August 21, Hixson drove to MPCF in order to submit paperwork and give an update on his return to work date. After meeting with MPCF Human Resources, he went to the office of Debra Moeller, Assistant to the Warden. The conversation's content varies significantly between Moeller's and Hixson's versions.

According to Moeller, Hixson was "out of control to the point where he could not stop talking and used the 'f-bomb' extensively." She did not feel intimidated, scared or unsafe during the conversation. Nor did she believe that Hixson would harm White, notwithstanding his crude comments. Instead, Moeller described Hixson as being "very agitated and frustrated" since Human Resources was asking him to take FMLA and Hixson believed it was unnecessary. With respect to Hixson's rant regarding the personal lives and promotional history of MPCF and DOC management employees, she was unsure whether Hixson was making up assorted rumors or was telling her what he had

heard. When she asked him what he was talking about because she had never heard any of this, Hixson replied: "Come on. Everyone's heard this." When asked where he got his information, Hixson responded that people talk.

When White entered Moeller's office, Hixson became a different person; he was calm and controlled. White asked Hixson what he could do for him, Hixson replied that he had seen the doctor, and because MPCF could not accommodate him, he would not be able to return before November 11. Additionally, as to FLMA, Hixson told White that he felt like he was being "messed with" since did he not believe that other employees had been required to take FMLA, to which White replied that he "was only conveying the message that he got." White then walked Hixson out the door.

After Hixson left, Moeller spoke with Stroud and White about her encounter with Hixson. Both Stroud and White asked her to write an incident report. The statement referenced, but did not specifically list, the comments Hixson made during the meeting. Moeller emailed the incident report to Nelson, Stroud, and White approximately forty-five minutes after the incident occurred.

Hixson does not remember the meeting in detail. He recalled speaking to Moeller regarding FMLA and does not dispute Moeller's version about him being upset about FMLA. Hixson did not recall talking about MPCF and DOC management, but admitted that he has talked about management employees in a negative way from time to time.

Whether Hixson made these statements is a credibility determination, and based upon the testimony presented, I find Moeller more credible. In both

his investigatory interview and at hearing, Hixson admitted that he could not remember the conversation's details. Moeller's statement was written shortly after her interaction with Hixson. Further, Moeller's testimony was consistent; Hixson made disparaging statements regarding MPCF and DOC management in a rambling conversation. Additionally, her description of Hixson's behavior is consistent with Hixson's characterization that he had "off the cuff" outbursts. Finally, her summary of Hixson's statements were consistent with statements that MPCF employees had previously heard Hixson make. As a result, I find that Moeller's version of the August 21 meeting more credible.

After receiving Moeller's report, Nelson forwarded it to Craig, Lynes, Pritchard and copied Stroud and White. Around 2:00 p.m., Pritchard contacted Moeller and asked her to elaborate on Hixson's statements. Pritchard memorialized Moeller's elaboration in an email. According to Pritchard's email, Hixson made eight statements concerning his impressions of DOC and MPCF management employees including statements concerning the personal lives and promotional history of these employees. Pritchard also noted that according to White, Hixson's demeanor was "nothing out of the ordinary," and he would not have known that anything had transpired.

Siler and Franklin were also assigned to investigate Hixson's meeting with Moeller. According to Siler, he was told that Hixson had made a threat about White, and then made other derogatory-type statements about other individuals at MPCF and DOC's central office.

The next morning, on August 22, Pritchard's email which included an email string containing comments by Craig and Nelson regarding Hixson's comments to Moeller, was forwarded by Franklin to Siler. A couple of minutes later, Siler added "Oh boy..." to which Franklin responded: "I know right?"

Between August 29 and October 17, Siler and Franklin interviewed twelve individuals, who included various management employees, a MPCF senior correctional officer and a correctional supervisor. Moeller, White, Nelson, Stroud and Mark Roberts, MPCF Associate Warden of Treatment, were interviewed on August 29; Craig and Pritchard were interviewed on August 31; Nick Peitz, MPCF Treatment Services Director, Colby Kriess, 8th Judicial District Community Based Corrections (CBC) Residential Supervisor, and Gary Peitz, 8th Judicial District CBC Assistant Deputy Director, were interviewed on September 19. Hixson's co-workers, Fred Denly, Senior Correctional Officer, and Garry Seyb, Correctional Supervisor captain were interviewed on October 17.

Besides clarifying what occurred at the August 21 meeting between Moeller and Hixson, the interviews were focused upon Hixson's emails beginning in August 2017, as well as comments regarding DOC central office and MPCF management.

The employees who were the subjects of these comments were asked their perception regarding Hixson's specific comments. In all instances, these employees testified that, in their opinion, Hixson's comments about them were false, slanderous, offensive, harassing and/or threatening. Because their view

as to these comments is subjective, I have not considered their testimony in determining whether Hixson's comments were, in fact, false, slanderous, offensive, harassing and/or threatening.

It is clear from the various interviews that not only had Hixson made these comments, but that other employees at MPCF had also made similar statements. Additionally, the "f-bomb" was commonly used at MPCF.

While these investigatory interviews were being conducted, Hixson had access to his email account and continued to send emails. On September 17, Hixson emailed the MPCF shift supervisor email group that a newly hired correctional officer is "a very arrogant SOB." Nelson replied to all that Hixson's information was not correct and that he found Hixson's "use of the term SOB inappropriate for state computer usage." Nelson then forwarded to Stroud this email, when then became part of the investigatory file.

On October 10, Hixson's co-worker, Ryan Buffington emailed Hixson: "... I am sure it's been great being away from this place. When you coming back?" On October 11, Hixson replied with a crude response that included a racist comment.

Based upon their review of approximately a year's worth of Hixson's emails, Siler and Franklin identified eight emails between November 7, 2017 to October 11, 2018, which had "negative/inappropriate/insubordinate content." Additionally, Siler and Franklin identified numerous emails which they considered to be "marginal." Siler then obtained the emails of all the individuals copied on these emails to see if the language used by Hixson was commonly

used by other DOC employees at MPCF. Siler found some marginal jokes but no other MPCF employee had authored emails similar to Hixson's.

Although Hixson was scheduled to return to work on November 4, he was not released from medical leave until January 22, 2019. On January 23, Hixson was placed on administrative leave pending an investigation. The following day, Siler and Franklin interviewed Hixson. They informed him that he was under investigation for making false and malicious statements about fellow DOC employees, misuse of DOC technology resources, and violations of general rules of employee conduct. Additionally, Siler and Franklin referenced the various DOC policies, and various Employee Handbook appendices thought to be applicable.

In the interview, Hixson admitted that the emails in question were inappropriate; "[b]ottom line is that all the statements you've pointed out to me shouldn't be in an email that's on a state computer." According to Hixson, his intent was not to hurt anyone. As to the rumors, he did not remember his conversation with Moeller. Similar to the emails, Siler and Franklin discussed each alleged statement with Hixson, and asked if it was something he would have said. Some of the statements Hixson denied, others he admitted he would have said something like that and provided an explanation. Hixson admitted it was possible that he said five of the statements. As to those statements, Hixson said he had "heard from other people. I am not the first to say it. I'm not the first to – bring it to – to the rumor mill if you will." When asked, Hixson could not provide the investigators with a reason why Moeller would lie.

On January 25, 2019, Hixson notified Siler and Franklin that based upon the interview he was going to get a referral to speak with a therapist/psychologist so he could "correct the issue for good." Additionally, he informed them that prior to his interaction with Moeller, he had taken two hydrocodone pain pills since he had just come from a doctor's appointment. Hixson believed being under the influence of a narcotic, hydrocodone, might possibly explain both the Moeller conversation and the August 10, 2018 email.

In a second email, written January 28 to Siler and Franklin, Hixson explained why he had "anxiety and frustration towards the administration." At the conclusion of the email, Hixson stated that in over 30 years at MPCF, he never had any anger issues, never physically or verbally threatened anyone, and that he was truly sorry and embarrassed.

After completion of the investigation, Siler submitted a written report to Michael Savala, DOC's general counsel, on February 1, 2019. The report contained accurate summaries of the twelve interviews, along with a very detailed summary of their conversation with Hixson regarding emails and statements made to Moeller. Although Hixson mentioned that he suffered from anxiety numerous times in the interview, his conclusion that the best way he knew how to deal with his anxiety was to not "hold stuff in" was not mentioned in Siler's report.

The report also included two emails sent by Hixson after his investigatory interview, a listing of eight emails which Siler and Franklin believed contained "negative/inappropriate/insubordinate conduct," five general statements

Hixson made to Moeller, and a listing of supervisory notes by security director Stump. The investigative report noted that the supervisory notes maintained by former MPCF security director Stump included seven dates where Stump coached and counseled Hixson "for negative/inappropriate content in emails," six supervisory notes "regarding verbal content/insubordinate remarks,"[4] and one supervisory note regarding gossip. The notes dated July 27, 2012 through November 8, 2012, refer to a Need, Expectations and Wants (NEWs) performance plan implemented pursuant to Hixson's 2012 performance evaluation. This plan was implemented to assist Hixson and three others in working together in "a more harmonious work environment." On November 8, after the third review, it was determined by both Stump and Hixson that the NEWs plan had been successful and thus was discontinued.

The report did not include the written warning that had been issued to Hixson in 2016 even though Hixson was found to have violated section H-1 and 2, the same rule violations as being violated in the instant case. Nor did the investigation contain evidence of other MPCF employees who had engaged in similar conduct in the past.

Based upon the interviews, supervisory notes, and the eight delineated emails and five general statements from Hixson's comments to Moeller, Siler found two findings of fact, which were:

- Correctional Supervisor Hixson admitted that the emails reviewed during investigative interview were not appropriate for the State of Iowa email system and in violation of IDOC

[4] These were seven dates listed in the report, however, 10/27/15 was listed twice and there was only 1 notation for that date.

Policy. Correctional Supervisor Hixson also admitted the October 10, 2018 email referring to [Hixon's Supervisor] as a "Taco eating punk" was not only inappropriate, but could be construed as raciest [sic].

- Evidence of statements from Deb Moeller, MPCF Management, peers interviewed and Correctional Supervisor Hixson's admissions indicate on August 21, 2018, Correctional Supervisor Hixson at a minimum, made the following threatening, malicious and/or false statements to Deb Moeller about leadership at MPCF and IDOC. (Statements are what was said in general, not exact)

Siler used the following factors to determine whether there was just cause to discipline Hixson; reasonable rule or order, a fair investigation was conducted, proof, analysis and mitigating factors. The report appeared to emphasize the informal coach and counseling sessions as Stump's supervisory notes were noted as justifications in both the just cause and proof sections of the report. Based upon their investigation, Siler determined that:

> Evidence of emails, supervisory notes and statements of witnesses and CS Hixson indicates CS Hixson has sent out emails containing vulgar language, raciest [sic] remarks and innuendoes not appropriate for the State of Iowa email system. Between November 2017 and October 2018, CS Hixson violated IDOC policy a minimum of eight (8) times by using email to compose and send material that is defamatory, false, inaccurate, embarrassing, obscene, profane, sexually-oriented, threatening, intimidating and/or racially offensive.
>
> Evidence of statements of witnesses and CS Hixson indicates CS Hixson has spread malicious and false rumors about other IDOC employees.[5]
>
> Evidence of statements of witnesses and CS Hixson indicate on August 21, 2018, Correctional Supervisor Hixson made threatening, malicious and/or false statements to Deb Moeller about leadership at MPCF and IDOC.

[5] This determination was not listed in the disciplinary letter.

The report did not list any mitigating factors. Siler did not include either the January 25 nor the January 28 email, referenced above, as factors which would mitigate the level of discipline imposed. Siler believed that because Hixson had not mentioned the possibility that he might be under the influence of hydrocodone during the investigatory interview, it was an excuse thought of after the interview.

The report cited four IDOC policies that Hixson violated with his emails and comments. These policies were:

- **IDOC Policy AD-PR-11 General Rules of Employee Conduct (section H-1)**
  "Employees Shall – Treat other employees, incarcerated individuals/clients, guests, visitors and the public with respect, courtesy and fairness."

- **IDOC Policy AD-PR-11 General Rules of Employee Conduct (section H-2)**
  "Employees Shall – Not threaten, intimidate or make false or malicious statements concerning fellow employees or those we serve."

- **IDOC Policy AD-PR-11 General Rules of Employee Conduct (section H-7)**
  "Employees Shall – Not harass or discriminate against others based on race, color, religion, sex, sexual orientation, marital status, age, national origin, physical or mental disability, or criminal history."

- **IDOC Policy AD-PR-27 Utilization of Information Technology Resources (section D-1a)**
  "Prohibited Uses – IDOC's email and Internet shall not be used for: Composing, sending, displaying, printing, downloading, or forwarding material that is defamatory, false, inaccurate, abusing, embarrassing, obscene, pornographic, profane, sexually-oriented, political, religious (except appropriate job duties), threatening, intimidating, racially offensive, discriminatory, or illegal. Any employee encountering any of these types of material should report it to their supervisor immediately."

On February 6, five days after the investigatory report had been submitted, Hixson emailed Siler and Franklin updating them that he had been diagnosed with "Complex Post-Traumatic Stress Disorder (PTSD)." Hixson stated this helped explain the "off the cuff" outbursts and asked if they needed a letter from Hixson's therapist confirming the diagnosis.

On February 22, Siler emailed Hixson asking if the PTSD diagnosis would affect his return to work. On February 26, Hixson notified MPCF's Human Resources Department that he had "received a on the job/work injury of Post-Traumatic Stress Disorder (PTSD), that he was having weekly follow-up appointments, and that he might need to file a worker's compensation claim." The next day, Hixson supplied the requested medical document from Hixson's mental health provider that stated Hixson "was fully able to perform the duties of his position with no restrictions." There was no evidence that MPCF asked for medical documentation with respect to the PTSD diagnosis. At some point, the worker's compensation claim was filed, but denied.

White, Franklin and Siler were not involved in determining the level of discipline. Normally, MPCF's management would review the investigatory report and determine the level of discipline. However, in this case, Craig asked Savala to review the report and determine the level of appropriate discipline. According to Savala, he was given this task because:

> Mr. Hixson had engaged in e-mail correspondence and improper, what I would call, attacks on upper management, including the warden at the Mount Pleasant facility, the deputy warden, the security director.

> He had also levied attacks against the HR director up here in Central Office, Susie Pritchard, and against the deputy director, who was then the acting director of the Department of Corrections, who was Dan Craig.

In determining the level of discipline, Savala reviewed the investigatory report, the documents contained in the report, as well as Hixson's position description questionnaire (PDQ) which is not part of this record. Additionally, he considered Hixson's position within DOC; he was a captain, upper management, and supervisory. Savala did not consider Hixson's 2016 written reprimand or the discipline of similarly situated employees when determining the appropriate level of discipline.

Savala believed that because supervisors lead by example and Hixson's behavior did not display leadership, integrity and professionalism, three important DOC characteristics, serious discipline was warranted. It was "pretty shameful for him to be engaged in that kind of behavior" as it "poisoned the working environment."

In determining the level of discipline, Savala noted that Hixson had conducted investigations regarding inappropriate use of the State's email system, had been coached and counseled on numerous times by Stump on inappropriate use of email and inappropriate staff interactions, and that past performance evaluations had contained comments about his improper use of email and how he was communicating with staff. Savala believed that previous attempts to correct Hixson's behavior had not been successful. Savala viewed the emails themselves as troubling.

> ... more importantly, it's the tone, it's the tenor, and the content of those e-mails that he was sending out that were offensive, and for someone with his years of experience, I mean it's more than he should know better. There's clear documentation that I received in the investigative file from the coaches and counselings, to his performance evaluations, that he was on notice that his conduct was not becoming a supervisor in his use of e-mails.

Further, Savala took into consideration that Hixson's mental health provider had determined that Hixson was "fully able to perform the duties of his position with no restrictions."

Savala knew that Hixson had filed a civil rights complaint when he did not receive a certain job which was administratively closed by the commission. Additionally, he did not identify any kind of conspiracy by the staff to get Hixson in trouble, nor did he find any nepotism by DOC that kept Hixson from being hired for certain jobs.

Although the investigative file contained an email from Hixson in which he discussed his PTSD, it does not appear Savala viewed this as a mitigating factor. Instead, Savala viewed it as an aggravating factor, as an example of Hixson not taking responsibility for his actions.

> So I guess I'm just really still unclear of where that—again, I mean, you know, as someone who is looking at an investigative file, obviously one of the things I'm looking at is taking responsibility and accountability for the rule violations, and the PTSD was never raised until after the discipline had been imposed by Mr. Hixson. So to me that was—you know, it goes to his credibility, and if this was such an issue, the prison would have had documentation in Mr. Hixson's file that this PTSD existed years ago. He's been with corrections for like 31 years, and so I looked at that as just not taking accountability, particularly as I had a statement from his mental health provider stating that Mr. Hixson could perform the duties of his position with no restrictions.

Savala acknowledged Hixson's lengthy career with DOC; over 30 years and recognized that Hixson did not have any prior discipline. Even so, he believed that Hixson's actions were so egregious that they warranted a higher level of discipline which is allowed under the State of Iowa Supervisor and Manager's Manual.

Originally, Savala considered termination or demotion to a correctional officer position as the appropriate level of discipline. After speaking to Lynes, Savala determined that five days was appropriate, and would hopefully change the behavior.

> When you have a supervisor like Mr. Hixson who is engaging in this kind of behavior, I mean it's an embarrassment to the Department, and it's not what we expect and it's not what we expect in front of other staff or to model in front of inmates.
>
> That's why the decision was to go with the five-day. It was just such an egregious—I mean there's multiple violations. It was race-based. It was threatening to physically assault somebody. It was false and malicious statements made about management at the prison and up here in Des Moines.

Approximately one month after Savala received the investigatory report, the State issued Hixson a five-day final warning paper suspension. The March 4, 2019, letter stated in part:

> This letter is to advise you that the investigation into your alleged threatening verbal statements and e-mail statements about MPCF and IDOC staff has been concluded. The investigation determined that your conduct violated the work rules outlined below. You have previously been counseled on the seriousness of this behavior. During the investigation, you admitted the verbal statements and e-mail statements were not appropriate and an improper use of the State of Iowa e-mail system and in violation of IDOC policy.
>
> ....
>
> Applicable employer policy (or policies):

- **IDOC Policy AD-PR-11 General Rules of Employee Conduct (section C-3)**
  "Employees are expected to be familiar with their job descriptions, essential functions, performance standards and job duties. Employees are expected to perform their duties in an impartial manner."

- **IDOC Policy AD-PR-11 General Rules of Employee Conduct (section H-1)**
  "Employees Shall – Treat other employees, incarcerated individuals/clients, guests, visitors and the public with respect, courtesy and fairness."

- **IDOC Policy AD-PR-11 General Rules of Employee Conduct (section H-2)**
  "Employees Shall – Not threaten, intimidate or make false or malicious statements concerning fellow employees or those we serve."

- **IDOC Policy AD-PR-11 General Rules of Employee Conduct (section H-7)**
  "Employees Shall – Not harass or discriminate against others based on race, color, religion, sex, sexual orientation, marital status, age, national origin, physical or mental disability, or criminal history."

- **IDOC Policy AD-PR-11 General Rules of Employee Conduct (section I-5)**
  "Employees Shall – Use IDOC computer system(s) and programs only for Department of Corrections business."

- **IDOC Policy AD-PR-27 Utilization of Information Technology Resources (section C-3a)**
  "IDOC e-mail accounts – shall be used for job-related activities only. Any inappropriate use of email can be cause for discipline."

- **IDOC Policy AD-PR-27 Utilization of Information Technology Resources (section C-3b)**
  "IDOC e-mail accounts – Any communication conducted on behalf of the IDOC represents the integrity of the IDOC."

- **IDOC Policy AD-PR-27 Utilization of Information Technology Resources (section C-3d)**
  "IDOC e-mail accounts – Accessing e-mail during non-working hours is prohibited without prior written approval."

- **IDOC Policy AD-PR-27 Utilization of Information Technology Resources (section D-1a)**
  "Prohibited Uses – IDOC's email and Internet shall not be used for: Composing, sending, displaying, printing, downloading, or forwarding material that is defamatory, false, inaccurate, abusing, embarrassing, obscene, pornographic, profane, sexually-oriented, political, religious (except appropriate job duties), threatening, intimidating, racially offensive, discriminatory, or illegal. Any employee encountering any of these types of material should report it to their supervisor immediately."

The emails and statements listed in the disciplinary letter were the same ones listed in the investigatory report. However, several IDOC policies listed in the disciplinary letter had not been included in the investigatory report; IDOC policy AD-PR-11 General Rules of Employee Conduct (sections C-3 and I-5), and IDOC Policy AD-PR-27 Utilization of Information Technology Resources (sections C-31, C-3b, and 3d).

During the intervening period, Hixson met with a therapist regarding his PTSD because he "wanted to get better and to be able to function well and to carry out [his] duties as a correctional professional." According to the therapist, any sort of stress or anxiety exacerbates the symptoms of PTSD. PTSD causes emotional dysregulation which means that:

> ... these people have a hard time controlling their temper or saying things that, perhaps, they're not entirely wise to say.
>
> It causes an emotional set of circumstances that can cause that person to have difficulty in social situations. They can become angry, you know, lack ability to really control themselves in social situations in a way that they would rather do, and that can lead to outbursts, it can lead to saying things that are just not appropriate on impulse.

As to emails, "the more they write the more angry they get. Their emotions run away with them and they begin to write things." According to the therapist, Hixson participated fully in therapy and did everything that he was asked to do.

Hixson appealed the five-day final warning paper suspension on March 9, 2019. In the appeal, Hixson noted that the investigation and subsequent discipline was not supported by just cause and created a hostile work environment.

On April 15, Hixson was informed that he was being reassigned to the Iowa State Penitentiary (ISP). This reassignment was effective the next day. It did not affect his job classification, pay or benefits. The reason given in the letter was for operational efficiency and "an opportunity for you to be successful as a Correctional Supervisor in a new environment." Hixson did not appeal this reassignment. Instead, in his written submission to the DAS supporting his position, he claimed it was a further penalty.

DAS issued the third-step response on May 10 denying Hixson's disciplinary appeal. In the denial of Hixson's grievance, the reassignment to ISP was not addressed. Hixson timely appealed the third-step response to PERB on May 16, 2020.

The record contains Stump's supervisory notes about Hixson from November 9, 2006 through June 24, 2017, which Siler noted in his investigation and were relied upon by Savala in determining discipline. Additionally, the coach and counsels were discussed at hearing. In reviewing these notes, all but six of the notes were written by Stump prior to MPCF's issuance of the December

2015 written reprimand which PERB, in Case Number 100723, ultimately determined was issued without just cause. As a result of PERB's finding in the previous decision that Stump's supervisory notes had not been shared with employees or placed in their personnel files, and that another employee had found mistakes, mischaracterizations and untruths in these supervisory notes, I have given them no weight.

Of the six remaining supervisory notes, two were related to the 2016 written reprimand and as a result cannot be used as evidence supporting this discipline, and two were unrelated to the issue before me. The final two, July 12, 2016 and June 24, 2017, were related to email correspondence. According to Stump's supervisory note, the July 12, 2016 note was a coach and counsel concerning an email. Hixson denies that Stump coached and counseled him regarding this email. As to the June 24, 2017 notation, Hixson explained that Stump's "caution" was he poked his head into the door of the office and said "Hey, watch the tone." As discussed above, I find the July 12 note is not relevant to the instant case. I do find the June 24 note minimally relevant since Hixson agreed that Stump told him to "watch the tone" which was further substantiated by Seyb, who testified that he believed Stump had told Hixson "to knock it off."

CONCLUSIONS OF LAW

Hixson alleges the State lacked just cause to support the five-day final warning paper suspension. This appeal was filed pursuant to Iowa Code section 8A.415(2)(*b*) which provides in relevant part:

> 2. *Discipline Resolution*
> *b.* If not satisfied, the employee may, within thirty calendar days following the director's response, file an appeal with the public employment relations board. . . . If the public employment relations board finds that the action taken by the appointing authority was for political, religious, racial, national origin, sex, age, or other reasons not constituting just cause, the employee may be reinstated without loss of pay or benefits for the elapsed period, or the public employment relations board may provide other appropriate remedies.

DAS rule 11—60.2 sets forth the specific measures and procedures for disciplining employees.

> **11—60.2(8A) Disciplinary actions.** Except as otherwise provided, in addition to less severe progressive discipline measures, any employee is subject to any of the following disciplinary actions when the action is based on a standard of just cause: suspension, reduction of pay within the same pay grade, disciplinary demotion, or discharge. . . . Disciplinary action shall be based on any of the following reasons: inefficiency, insubordination, less than competent job performance, refusal of a reassignment, failure to perform assigned duties, inadequacy in the performance of assigned duties, dishonesty, improper use of leave, unrehabilitated substance abuse, negligence, conduct which adversely affects the employee's job performance or the agency of employment, conviction of a crime involving moral turpitude, conduct unbecoming a public employee, misconduct, or any other just cause.

In discipline cases, the State bears the burden of establishing that just cause supports the discipline imposed. *Stein and State of Iowa (Iowa Workforce Dev.)*, 2020 PERB 102304 at 16; *Cole and State of Iowa (Dep't of Human Serv.)*, 2020 PERB 102113, App. A at 19; *Phillips and State of Iowa (Dep't of Human Res.)*, 12-MA-05, App. A at 11. The term "just cause" as used in section 8A.415(2)(*b*) and DAS rule 11-60.2 is not defined. *Cole*, 2020 PERB 102113, App. A at 19; *Wilkerson-Moore and State of Iowa (Dep't of Human Serv.-Fiscal Mgmt. Div.)*, 2018 PERB 100788, App. A at 13.

PERB has long held that just cause determinations "require an analysis of all of the relevant circumstances concerning the conduct which precipitated the disciplinary action and not a mechanical, inflexible application of fixed 'elements' which may or may not have any real applicability to the case under consideration." *Palmer and State of Iowa (Dep't of Corr.)*, 2019 ALJ 102115 at 14; *Hunsaker and State of Iowa (Dep't of Emp't Serv.)*, 90-MA-13 at 40. Instead, the Board looks to the totality of the circumstances, which may include:

> Whether the employee has been given forewarning or has knowledge of the employer's rules and expected conduct; whether a sufficient and fair investigation was conducted by the employer; whether reasons for the discipline were adequately communicated to the employee; whether sufficient evidence or proof of the employee's guilt of the offense is established; whether progressive discipline was followed, or not applicable under the circumstances; whether the punishment imposed is proportionate to the offense; whether the employee's employment record, including years of service, performance, and disciplinary record, have been given due consideration; and whether there are other mitigating circumstances which would justify a lesser penalty.

PERB has consistently held that the disciplinary letter must contain the reasons for the disciplinary action and that just cause must be determined upon the reasons stated in this document. *Phillips*, 12-MA-05, App. A at 12; *Barnard & State of Iowa (Dep't of Human Serv.)*, 2017 ALJ 100758 at 16; *Rode & State of Iowa (Dep't of Corr.)*, 2015 ALJ 100041 at 11; *Eaves & State of Iowa (Dep't of Corr.)*, 03-MA-04 at 14.

In the instant case, the five-day final warning paper suspension was based upon the eight emails the State viewed as containing "negative/inappropriate/insubordinate content" as well as five comments made to Moeller about MPCF and IDOC leadership which the State viewed as

"threatening, malicious and/or false." There was extensive testimony concerning a plethora of emails the State considered to be marginally inappropriate, however, the disciplinary letter does not contain or reference these emails. Due to the lack of specificity in the disciplinary letter as to the marginal emails "not appropriate for the State email system," the just cause determination rests solely upon the eight emails and five comments contained in the disciplinary letter.

Retaliation Claim:

Prior to the third step, Hixson alleged that in addition to the five-day final warning paper suspension, DOC took additional retaliatory action when he was assigned to the ISP effective April 15, 2019. However, because these events took place after the discipline was determined, I cannot consider it part of the analysis of the "totality of circumstances" that may be relevant to the just cause determination because it was not part of Savala's determination. *Cooper and State of Iowa (Dep't of Human Rights),* 97-MA-12 at 33. *See Tiegland and State of Iowa (Dep't of Corrs.),* 03-MA-10, App. at 6 (*Cannot raise new allegations of certain provisions of the Iowa Code and DAS rules for the first time on appeal to PERB*); *Dunkel and State of Iowa (Dep't of Corrs.),* 2016 ALJ 100031 at 18 (*Cannot raise retaliation claim for the first time on appeal to PERB).*

Notice and Forewarning of Work Rules:

Hixson contends that the policies delineated in the disciplinary letter pertained to on duty conduct and thus were not applicable since he was off duty as a result of being on medical leave.

However, grievance arbitrators have generally held that off duty employees can be found to have violated an employer's on duty conduct policies when a nexus exists between the conduct and the employment relationship. Arbitrators have also found that when an off-duty employee is on the employer's premises, the employee has an obligation to observe the employer's work rules. Elkouri & Elkouri, *How Arbitration Works,* 8th Edition, 15-13 and 15-14.

Since Hixson used his state email address while off duty, I conclude that a nexus exists between Hixson's conduct and employment at MPCF. Thus, I find that the policies listed in Hixson's disciplinary letter with respect to employee conduct and utilization of information technology are applicable to Hixson's emails. I further find that these policies are also applicable to Hixson's comments, while on sick leave, since the conversation took place in Moeller's MPCF office. In both situations, Hixson was obligated to observe the applicable DOC work rules.

Although Hixson admitted in his investigatory interview that his emails were inappropriate, he now argues the State lacked just cause for his suspension because no one had expressed to him or put him on notice that the emails were inappropriate. Further, he had never been advised that the August 11 email, which was the impetus for the investigation, was inappropriate or offensive.

Hixson was not specifically forewarned by Nelson, Stroud or White that his emails were inappropriate. However, he has admitted the content of these emails was not appropriate and should not have been sent. Further, Hixson

was aware of the DAS and DOC policies regarding email communication and the general rules of employee conduct. He had signed receipt of the applicable DOC rules, received training on these policies, and had investigated and disciplined subordinates for violations regarding email communication. Additionally, professional decorum dictates that it is inappropriate to overtly spread disparaging, unverified personal rumors against DOC and MPCF management staff, especially when speaking to the Warden's administrative assistant.

Thus, through mere professionalism or an awareness of DOC's policies, Hixson should have known that this conduct, both his written and verbal communication, was unacceptable and did not conform to DOC policies.

Investigation:

Hixson has challenged the sufficiency of the investigation. It is Hixson's belief that the State should have brought in disinterested investigators; employed outside of DOC. He argues the investigation was faulty because Siler and Franklin were not disinterested; they had read and commented upon an email string sent by DOC management in which various DOC management had voiced their opinions concerning statements Hixson allegedly made in the August 21 meeting with Moeller.

It is unfortunate that Siler and Franklin saw and commented upon the email string. However, the viewing of this email string and the lone comment of "oh boy...." by Siler and the response of "I know right" by Franklin is insufficient to warrant outside investigators. These comments do not establish that Siler

and Franklin did not conduct a fair investigation. Additionally, there is no evidence that the investigation was not conducted fairly. These two DOC employees were experienced investigators. Their role was to gather the facts and determine whether discipline should be imposed, not determine the level of discipline.

The investigation conducted by Siler and Franklin was sufficiently thorough to establish that Hixson authored the emails in question and that he made the comments, which DOC viewed as inappropriate, during the August 21 meeting with Moeller. On January 24, 2019, Siler and Franklin met with Hixson. During the interview, Hixson was advised of the allegations, and was given an opportunity to respond.

Siler and Franklin reviewed the emails at issue, and Hixson was given an opportunity to explain the meaning and content of each of the emails. Further, emails of employees who had received Hixson's emails were obtained in order to determine if those employees had made similar comments or used similar language.

With respect to Hixson's comments made to Moeller at the August 21 meeting, Siler and Franklin interviewed both Moeller and Hixson to obtain their version of the conversation. Additionally, Hixson was asked specifically as to whether the comments were something he said or possibly would have said to Moeller. Stroud and White were interviewed since they had spoken to Moeller shortly after the conversation took place. Siler and Franklin also interviewed employees who had knowledge of Hixson's comments, which included DOC and

MPCF management employees referenced in the conversation. Further, six other individuals, including two of Hixson's coworkers, were interviewed concerning Hixson's alleged statement about DOC and MPCF leadership, in order to determine if they had previously heard Hixson make similar statements.

In all, the investigation garnered the facts necessary to determine whether, in each instance, Hixson had engaged in the alleged conduct. As a result, I find that the investigation was sufficient and fair to garner the facts necessary for the State to make an informed decision about whether discipline should be imposed and the appropriate level of discipline.

Evidence of violation:

Hixson alleges the State did not show with substantial proof that he is guilty of violating the work rules cited in the disciplinary letter. Hixson was disciplined under two IDOC work rules: AD-PR-11 (General Rules of Employee Conduct) specifically sections C-3, H-1, H-2, H-7 and I-5, and AD-PR-27 (Utilization of Information Technology Resources) sections C-3a, C-3b, C-3d and D-1a.

However, the State has not established that Hixson's conduct violated all of the above-cited sections of these two work rules. In particular, there is no testimony as to how Hixson violated AD-PR-11 sections C-3,[13] and I-5[14], and

[13] AD-PR-11, C-3: Employees are expected to be familiar with their job descriptions, essential functions, performance standards and job duties. Employees are expected to perform their duties in an impartial manner.

[14] AD-PR-11, I-5: Employees Shall – Use IDOC computer system(s) and programs only for Department of Corrections business.

AD-PR-27, section C-3b[15]. With regards to section H-7,[16] I cannot conclude that Hixson's use of a racial comment, while inappropriate, constituted harassment or discrimination. Further, with regard to AD-PR-27, section C-3d,[17] although MPCF employees are prohibited from accessing emails during non-working hours without prior written approval, it is clear that contrary to policy, White was aware and allowed correctional supervisors to access their emails during non-working hours. Based upon the above, I conclude the State has not established that Hixson violated AD-PR-11 sections C-3, H-7 and I-5 and AD-PR-27 section C-3d.

However, there is sufficient evidence in the record to conclude that Hixson violated AD-PR-11 sections H-1[18] and H-2[19], and AD-PR-27 sections C-3a[20] and D-1a.[21] Although Hixson admitted that his emails contained in the disciplinary letter were inappropriate, he contends the State failed to prove these eight emails violated DOC policies. Hixson argues he has throughout the years

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[15] AD-PR-27, C-3d: IDOC e-mail accounts – Any communication conducted on behalf of the IDOC represents the integrity of the IDOC.

[16] AD-PR-11, H-7: Employees Shall – Not harass or discriminate against others based on race, color, religion, sex, sexual orientation, marital status, age, national origin, physical or mental disability, or criminal history."

[17] AD-PR-27, C-3d: IDOC e-mail accounts – Accessing e-mail during non-working hours is prohibited without prior written approval.

[18] AD-PR-11, H-1: Employees Shall – Treat other employees, ... with respect, courtesy and fairness.

[19] AD-PR-11, H-2: Employees Shall – Not threaten, intimidate, or make false or malicious statements concerning fellow employees or those we serve.

[20] AD-PR-27, C-3a: IDOC e-mail accounts – Shall be used for job-related activities only. Any inappropriate use of email can be cause for discipline.

[21] Prohibited Uses – IDOC's email and Internet shall not be used for: Composing, sending, displaying, printing, downloading, or forwarding material that is defamatory, false, inaccurate, abusing, embarrassing, obscene, pornographic, profane, sexually-oriented, political, religious (except appropriate job duties), threatening, intimidating, racially offensive, discriminatory, or illegal. Any employees encountering any of these types of material should report it to their supervisor immediately.

vented without repercussions. In support of this argument, he refers to an email sent to Nelson regarding promotions; promoting from outside is demoralizing for those within the institution. However, the email sent to Nelson, referenced above, as well as other emails sent by Hixson to various MPCF management, were for the most part professional and respectful, which is contrary to the two emails at issue sent to MPCF management. These two emails were not professional, and contained both inappropriate content and characterizations of MPCF employees and management.

Hixson also argues he was never informed that his emails were not appropriate. Although MPCF management did not warn him that his emails were inappropriate and he could be disciplined if he did not change the tone of his emails, it is obvious that Hixson, as a correctional supervisor, should have known that the comparisons and crude phrases used in these emails were inappropriate and the individuals referenced in these emails were not treated with dignity and respect. As a correctional supervisor, Hixson should not have to be told it was not acceptable for an email to contain vulgar content, and that an email needed to be respectful in tone and content. Hixson chose the tone to convey his messages. Hixson's emails contained inappropriate characterizations of MPCF employees and management. They were insulting, defamatory and contained crude and embarrassing comments and a racial comment. Based upon the evidence presented, I conclude the State has established the eight emails listed in the disciplinary letter violated section AD-PR-11, section H-1 and AD-PR-27 sections C-3a, and D-1a.

Hixson does not admit that he made the statements during the August 21 meeting with Moeller. As discussed in the finding of facts, whether Hixson made these statements is a credibility determination, and based upon the testimony presented, I found Moeller more credible. Having found that Moeller's version of the August 21 meeting is more credible, I conclude that Hixson made the statements contained in the disciplinary letter. Although Hixson was not the only MPCF employee to have voiced these rumors, this does not excuse his behavior. These statements were disparaging and mean spirited, and the individuals about whom the comments referenced were not treated with respect and courtesy. As a result, I conclude the State has established that the five general comments listed in the disciplinary letter violated AD-PR-11, sections H-1 and 2.

Discipline Imposed:

Having concluded that the State had just cause to discipline Hixson for violating DOC's work policies, referred to above, the State has the burden to prove that the level of discipline issued was appropriate. In this case, the State determined that progressive discipline was not warranted, and instead issued a five-day final warning paper suspension.

Based upon the totality of the record, however, the State has not established that Hixson committed the type of misconduct that warrants skipping steps in the disciplinary process and issuing a five-day final warning paper suspension.

It is well established that the State's disciplinary policy clearly contemplates a system where penalties of increasing severity are applied to repeated offenses until the behavior is either corrected or it becomes clear that the employee's behavior cannot be corrected. *Cason and State of Iowa (Dep't of Revenue),* 2020 ALJ 102367 at 26. PERB has consistently held that when some form of discipline is required, the discipline should be progressive and proportional to the violation. *Wilkerson-Moore*, 18 PERB 100788, App. A at 20; *Phillips,* 12-MA-05, App. A at 16. The purpose of progressive discipline is not to punish, but instead to correct the unacceptable behavior while affording the employee the opportunity to improve. *Cason,* 2020 ALJ 102367 at 27; *Wilkerson-Moore*, 18 PERB 100788, App. A at 20; *Phillips*, 12-MA-05, App. A at 16.

Skipping Steps:

Progressive discipline is generally used for less serious work rule violations and improper conduct. *Stockbridge and State of Iowa (Dep't of Corrs.),* 06-ALJ-06 at 16. Even so, PERB has long recognized instances when the employer is justified in skipping some of the steps in the disciplinary process. *Stein,* 2020 PERB 102304 at 16; *Cole*, 2020 PERB 102113, App. A at 27. *Wise and State of Iowa (Dep't of Human Servs.),* 2016 PERB 100005, App. A at 24.

The State argues that the five-day final warning paper suspension was warranted under the circumstances. Savala believed that Hixson's emails and comments were so egregious they warranted a five-day final warning paper suspension. In making this determination, Savala considered the statements

made by Hixson which resulted in discipline, reviewed the investigatory file and considered Hixson's length of service, performance evaluations, and discipline history. He focused on Hixson's coaching and counseling sessions, documentation from Hixson's medical provider, as well as his PTSD claims. After considering more serious discipline, demotion or termination, he determined that a five-day suspension with a final warning was appropriate.

Medical Provider and PTSD Claim:

Hixson argued that MPCF engaged in disparate treatment by not affording him an opportunity to correct this issue through medical and psychiatric intervention prior to the imposition of discipline. This argument is premised upon Pritchard's testimony that discipline including a last chance agreement was held in abeyance for an employee who had "a situation with alcohol."

PERB has long recognized that treatment accorded similarly situated employees may be relevant in determining the level of discipline. *Kuhn & State of Iowa (Comm'n of Veterans Affairs),* 04-MA-04 at 48. Just cause requires the employer to treat similarly situated employees in the same manner. *Smith & State of Iowa (Dep't of Human Servs.),* 2019 ALJ 102220 at 14. However, due to the lack of specificity and evidence concerning the employee referred to above, I cannot conclude that the State has engaged in disparate treatment when they did not allow Hixson's discipline to be held in abeyance until treatment for PTSD was completed.

In considering the level of discipline, Savala gave weight to Hixson's health care provider's documentation which provide that he was "fully able to perform

his job duties." Savala was aware that Hixson had filed a worker's compensation claim which was denied. He discounted the PTSD diagnosis because it "was never raised until after the discipline had been imposed ... and if this was such an issue, the prison would have had a document in Mr. Hixson's file that this PTSD existed years ago." Consequently, Savala believed that Hixson was not accepting responsibility for his behavior, thus supporting his determination that skipping disciplinary steps was appropriate.

However, Savala's conclusion regarding PTSD is not supported by the record. Hixson did not obtain the PTSD diagnosis until after completion of his January 24, 2019, investigatory interview, and thus the State's documentation with regards to PTSD would not have existed. Further, after the investigatory interview and before the discipline was imposed, Hixson sought and was receiving help for his PTSD. As a result, Hixson's PTSD diagnosis should have been considered a mitigating factor, not an aggravating factor which warranted skipping disciplinary steps.

Performance Evaluations:

In determining the level of discipline imposed, Savala noted that Hixson's performance evaluation had documented that Hixson's behavior did not meet expectations. Because Hixson's performance evaluations are not part of the record, it appears that Savala used Stump's supervisory notes dated July 27, 2012 through November 8, 2012, which included a summary of a performance plan implemented to assist in creating "a more harmonious work environment." Assuming that the supervisory note was accurate, it should not have been given

any weight in determining the level of discipline since this note was approximately six years old, and performance plans by design are meant to correct an employee's behavior, which it did. Therefore, due to the lack of concrete evidence that Hixson's performance was not up to expectations, the State has not established that Hixson's performance evaluations should have been used as a contributing factor for skipping steps in the disciplinary process.

Past Disciplines:

Nor can I find that past discipline warrants skipping steps in the disciplinary process. Savala considered Hixson's history of coaching and counseling sessions from Stump's supervisory notes dated November 9, 2006 through June 24, 2017, as an important consideration. Savala emphasized that Hixson "had been coached and counseled on numerous times by Mr. Stump on his inappropriate use of emails and his inappropriate staff interaction."

Although coaching and counseling sessions may be useful in determining whether discipline is appropriate, coaching and counseling are not the same as prior disciplinary action,[27] and thus are not as useful in the determination of whether skipping disciplinary steps was warranted. As a result, Hixson's coaching and counseling sessions, referred to in Stump's supervisory notes, should not have been a primary consideration in determining whether skipping steps in the disciplinary process was warranted, as there was no evidence that these notes had been shared with Hixson nor placed in his personnel file. In

[27] 8A.415(2) defines disciplinary actions as suspensions, reduction of pay within the same pay grade, disciplinary demotion, or discharge.

addition, an overwhelming majority of these notes had occurred prior to 2016, which further dilutes their weight in determining whether skipping steps in the disciplinary process was warranted.

Savala believed that Hixson's emails and comments were so egregious they warranted a higher level of discipline. I do not reach the same conclusion. There is no question that the content of Hixson's emails was crude, vulgar, sometimes profane and disrespectful. However, the use of crude or vulgar language is not so egregious that steps should be skipped in the disciplinary process, especially when management was aware of crude emails and did not warn him that these types of comments were not acceptable.

As to Hixson's comments to Moeller, clearly these comments were rumors. Although I do not condone rumors and the use of profanity, the circumstances surrounding the comments must be considered. Hixson had just come from Human Resources and was "very agitated" that he needed to use FMLA. Hixson's comments were an outburst without reflection by someone who was frustrated. He suffered from PTSD which a therapist testified causes "emotional dysregulation" which could "lead to outbursts, it can lead to saying things that are just not appropriate on impulse." Further, profanity was commonly used and was part of a correctional supervisor's verbal interactions. There was no perceived threat of violence, as reflected by Moeller in her testimony, nor evidence that Hixson's conduct had an adverse impact on the DOC's or MPCF reputation. As a result, I conclude that the State has not established that Hixson has committed the type of misconduct that warrants skipping steps in

the disciplinary process. However, Hixson's emails and comments clearly warrant discipline.

Appropriate Penalty:

As previously discussed, the purpose of discipline is to put the employee on notice that more severe discipline may be imposed if the offense is repeated.

After consideration of the entirety of the record and the arguments raised by the parties, I conclude a written reprimand is appropriate. Hixson has been employed by the DOC for over 30 years. Prior to this discipline, Hixson had received a written warning in 2016 for "making unprofessional statements regarding his supervisor in the presence of a peer and subordinates." Although Hixson's current conduct may have been related to the conduct for which he received the written warning, there was no evidence in the record as to this warning and as a result, the State has not established the nexus between Hixson's past misconduct and the conduct at issue. Norman Brand, *Discipline and Discharge in Arbitration,* at 2-90 (BNA Books, 2015); *Wise,* 2016 PERB 100005, App. A at 25-26. Further, there is no evidence in the record that it was considered by MPCF in determining discipline.

Hixson's behavior was clearly contrary to MPCF rules, and as a supervisor, Hixson was knowledgeable about MPCF rules. Further, Hixson had investigated and disciplined subordinates for this type of behavior. However, I place considerable weight on mitigating circumstances which warrant a lesser penalty than imposed by MPCF. Hixson, in his investigatory interview, acknowledged that the emails were inappropriate. Further, shortly after this

interview, Hixson sought help, was diagnosed as having PTSD, referred to a psychologist for therapy, has participated fully in therapy and done everything the therapist has asked him to do. In a letter written five days after his investigatory interview, Hixson acknowledged that he was truly sorry and embarrassed. Hixson's acknowledgement and actions by seeking help and undergoing treatment are mitigating circumstances that supports a lesser discipline since Hixson is working to correct his demonstrated poor judgment. Based upon the above reasoning and consistent with the tenets of progressive discipline, I conclude that a written reprimand, which is the first step of progressive discipline, is appropriate.

PERB Case 102330: Evaluation

FINDINGS OF FACT

Normally, Hixson's performance evaluation rating period ran from December 1 to December 1. However, an evaluation was not prepared for the rating period of December 1, 2017 to December 1, 2018, due to Hixson's leaves of absence; he was on medical leave from July 17, 2018 to January 22, 2019, and placed on administrative leave from January 23 to March 5, 2019. Thus, Hixson's performance evaluation rating period ran from December 1, 2017 to April 3, 2019. The change in the rating period was consistent with DOC's practice of adjusting evaluation rating periods in order for the employee to be evaluated for a twelve-month period. Additionally, White consulted with both Human Resource departments at MPCF and DOC central office who verified that the evaluation rating period could be extended past the 12-month requirement.

Human Resource departments at MPCF and DOC central office who verified that the evaluation rating period could be extended past the 12-month requirement.

In a meeting with White and Stroud, on March 25, 2019, Hixson was informed that White would evaluate Hixson's performance, and the subject matter contained in the disciplinary letter would be a consideration in the evaluation's rating period.

On April 3, White, Stroud and Hixson met to review Hixson's performance for the 16-month rating period December 1, 2017 to April 3, 2019. Hixson was evaluated over four goals, and was rated "Meets Expectations" on all of the goals with one exception. On the goal "performs security supervisory duties," Hixson received a "Does Not Meet Expectations." White noted:

> During this rating period C.S. Hixson has been investigated by the IDCO Inspector General's Office (IGO) and found in violation of multiple sections of IDOC policy AD-PR-11 General Rules of Employee Conduct; and IDOC policy AD-PR-27 Utilization of Information Technology Resources, specifically demeanor issues and misuse of state communication systems. As a result C.S. Hixson failed to meet expectations outlined regarding "supervise and immediately correct subordinate staff, and/or offender violations of policy and procedure," and "advise and counsel staff and offenders to maintain their demeanor. Based on C.S. Hixson's own documented demeanor issues, C.S. Hixson cannot be reasonably believed to be able to impartially, and effectively address similar concerns with his direct reports, given the severity of his own violations of these expectations. 2-State Exhibit 3 at 3.

Even with this rating, Hixson received an overall "Meets Expectations" for this rating period. In the "Supervisor's Comments" section at the end of the evaluation, White provided, in relevant part, the following comment:

> Due to a combination of CS Hixson's medical leave and administrative leave pending an investigation by Department's

> Inspector General's Office (IGO), the evaluation period dates needed to be modified as appropriate.
> On 3/15/2019, an investigation was completed by the IGO and as a result of this investigation, CS Hixson received a Five (5) day paper suspension and final warning. This was due to unprofessional/inappropriate e-mails and verbal comments. It is this writer's hope that this corrects CS Hixson's behavior. 2-State Exhibit 3 at 5.

Next to White's comment, Hixson wrote: "Evaluation is against Administrative Rules."

Hixson filed a noncontract grievance concerning this evaluation with DOC on April 8, 2019. After MPCF denied this grievance at both steps 1 and 2, Hixson submitted the grievance to DAS on April 15. A designee of the DAS director issued a decision denying Hixson's appeal on May 15. Hixson subsequently filed the instant appeal to PERB on May 20, 2019.

CONCLUSIONS OF LAW

Hixson filed this appeal pursuant to Iowa Code section 8A.415(1) which provides in part:

> **8A.415 Grievance and discipline resolution**
>
> 1. *Grievances.*
>
> ....
>
> *b.* If not satisfied, the employee may, within thirty calendar days following the director's response, file an appeal with the public employment relations board. . . . Decisions rendered shall be based upon a standard of substantial compliance with this subchapter and the rules of the department. Decisions by the public employment relations board constitute final agency action.

Particularly significant in the above-excerpted section is that PERB's decisions in grievance appeals "shall be based upon a standard of substantial

compliance with [subchapter IV of chapter 8A] and the rules of the department of Administrative Services]." *Brooks and State of Iowa (Dep't of Educ.),* 2015 PERB 15-MA-01 at 4; *Uhlenhopp and State of Iowa (Dep't of Transp.),* 19 ALJ 102329 at 6; *Pierce and State of Iowa (Dep't of Human Servs.),* 2016 ALJ 100728 at 3; *Jacobs & Iowa (Dep't of Natural Res.),* 2016 ALJ 100086 at 6-7.

For an employee to prevail under this statutory framework, an employee must establish that the State failed to substantially comply with above cited section of the Iowa code or a DAS rule. *Moser and State of Iowa (Dep't of Transp.),* 2019 ALJ 102190 at 8. Although "substantial compliance," is not defined, PERB has generally defined it as:

> [A]ctual compliance in respect to the substance essential to every reasonable objective of the statute. It means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

Brooks, 2015 PERB 15-MA-01 at 7, *Moser*, 2019 ALJ 102190 at 8.

Hixson alleges the State failed to substantially comply with DAS subrule 11–62.2(2) when the DOC evaluated him after sixteen months instead of the required twelve months, and did not rate his performance as "Meets Expectations" while on FMLA.

DAS subrule 11–62.2(2) pertains to performance evaluations. It provides in relevant part:

> 62.2(2) *Performance plan.* A performance evaluation shall be prepared for each employee at least every 12 months. Additional

> evaluations may be prepared at the discretion of the supervisor. Ratings on the evaluation form may also include job-related comments concerning achievements or areas of strength, areas for improvement, and training/development plans. The supervisor or team shall discuss the evaluation with the employee, and the employee shall be given the opportunity to attach written comments. Periods of service during FMLA, workers' compensation, military, or educational leave shall be considered as meeting job expectations.

It is clear that MPCF did not literally comply with DAS subrule 11–62.2(2) when Hixson's rating period was for 16 months instead of a 12-month period. However, literal compliance is not the issue before me. Instead, the issue is whether Hixson's evaluation met the objectives of this subrule.

In viewing DAS subrule 11–62.2(2), its objective is to establish a performance evaluation system which provides an employee with regular feedback and the employee is given an opportunity to respond with written comments. *See: Donaldson and State of Iowa (Dep't of Nat. Res.)*, 94-MA-15 at 14-15. (*Employee is entitled to an evaluation of her performance on the duties specified on the applicable performance plan, judged by the stated standards, and an opportunity to attach written comments if she chooses.)* Further, when an employee is on leave (*i.e.* FLMA), during the rating period, then the employee's performance is considered as meeting job expectation. *See Gott and Dep't of Corr.*, 87-MA-22 at 8. (*Rule requires performance during periods of extended absences to be considered competent.*)

In the instant case, MPCF clearly provided Hixson with feedback and Hixson commented when the evaluation was given to him. However, within this 16-month rating period, Hixson should have been rated as "Meets Expectations"

during the period he was on FMLA, July 17, 2018 through January 22, 2019. Clearly, MPCF did not consider Hixson's performance during this timeframe as meeting expectations. As a result, Hixson has established the MPCF, by not considering Hixson's performance while on FMLA as "Meet Expectations," failed to substantially comply with DAS subrule 11–62.2(2).

Additionally, Hixson alleges the evaluation contained retaliatory, slanderous, and career injurious comments which were not brought to his attention prior to the issuance of the performance evaluation.

However, PERB's role in evaluation-based grievances is not to evaluate the merits of the evaluator's "subjective judgements, but to instead [e]nsure the evaluation scheme is essentially followed." *Donaldson*, 94-MA-15 at 14. Thus, it is not appropriate for me to substitute my judgement in place of White, who evaluated Hixson's performance.

Having concluded that Hixson is entitled to relief on the claim that the State failed to substantially comply with DAS subrule 11–62.2(2) when it did not rate Hixson's performance as "Meet Expectations" while on FMLA, an appropriate remedy must be fashioned. PERB has previously held that a "make whole remedy" is appropriate. "We attempt to make the employee whole by placing them in the position the employee would have been in had no violation of a 8A.415(1) occurred. *Fulton, et al. and State of Iowa (Dep't of Corrs.) and AFSCME/Iowa Council 61,* 10-MA-03 at 21; *Donaldson,* 94-MA-15 at 15; and *Israni and State of Iowa (Dep't of Nat. Res.)*, 92-MA-23 at 17.

Consequently, in order to place Hixson in a position he would have been in if a violation of DAS subrule 11–62.2(2) had not occurred, Hixson is entitled to a performance evaluation in which his performance is considered "Meets Expectations" during the period July 17, 2018 to January 22, 2019 when Hixson was on FMLA, a discussion of the evaluation, and an opportunity to attach comments. However, due to intervening events, I do not believe that a discussion of the evaluation needs to take place.

Based upon my conclusions in PERB case numbers 102326 and 102330, I propose the following:

ORDER

Case number 102326 (five-day final warning paper suspension): the State shall rescind and remove the original and all copies of the five-day final warning paper suspension issued to Hixson on March 4, 2019, and replace it with a written reprimand. Additionally, the State will remove any other documentation of the five-day final warning paper suspension from all personnel files maintained by the State concerning Hixson.

Case number 102330 (performance evaluation): Charles Hixson's grievance action appeal is SUSTAINED.

The original and all copies of the invalid performance evaluation for the period of December 1, 2017 through April 3, 2019, together with any comments in response to the evaluation, shall be removed from all personnel files maintained by the State.

White shall, within thirty days of the date below, rewrite Hixson's performance evaluation so that it reflects Hixson "Meets Expectations" during the period July 17, 2018 through January 22, 2019 when Hixson was on FMLA, and Hixson shall be given an opportunity to attach comments.

The costs of reporting and of the agency-requested transcript for both cases are assessed against the Appellee, State of Iowa (Department of Corrections), in the amount of $4,566.25 pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to the State in accordance with PERB subrule 11.9(3).

This proposed decision will become PERB's final agency action on the merits of Hixson's appeal pursuant to PERB rule 621—11.7 unless, within 20 days of the date below, a party aggrieved by the proposed decision files an appeal to the Board or the Board determines to review the proposed decision.

The ALJ retains jurisdiction of this matter in order to address any remedy-related matters which might arise and to specify the precise terms of the remedy. In order to prevent further delay in the resolution of this matter, a hearing to receive evidence and argument on the precise terms of the remedy, should the parties fail to reach agreement, will be scheduled and held within 45 days of the date this proposed decision becomes PERB's final action on the merits of Hixson's appeals.

DATED at Des Moines, Iowa, this 4th day of March 2021.

Susan M. Bolte

Susan M. Bolte
Administrative Law Judge

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